

STATE OF MICHIGAN
COURT OF APPEALS

ADVANTAGE SYSTEMS, INC.,

Plaintiff/Counter Defendant-
Appellant,

v

GARY BOTTGER,

Defendant/Counter Plaintiff-
Appellee.

UNPUBLISHED

May 29, 2001

No. 220332

Oakland Circuit Court

LC No. 95-509773-CK

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a judgment of \$34,100 on defendant's counter-complaint for tortious interference with a business relationship. We reverse.

Plaintiff argues that the trial court erred in denying plaintiff's motion for a directed verdict, motion for judgment notwithstanding the verdict (JNOV), and motion for reconsideration. We agree.

This Court most recently addressed the claim of tortious interference with a business relationship in *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996), describing the elements of the claim as follows:

The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. [Citations omitted.]

Further, the *BPS* Court found that where a party acts with a legitimate business purpose, a claim for tortious interference is without merit. *Id.*

Plaintiff argues that defendant did not establish that it performed a lawful act with malice and without justification. Defendant's amended counter-complaint alleged that plaintiff filed a complaint and received an ex parte restraining order prohibiting defendant from working for Production Tool Systems (PTS) and that such actions constituted tortious interference with a business relationship for the following reasons: plaintiff wrongfully alleged that PTS was a client despite knowing that PTS denied such a relationship; plaintiff had only one contact with PTS when plaintiff answered an advertisement and submitted the resumé of a person it did not represent; and, plaintiff did so in order to make an example of defendant and to keep other employees from leaving its employ.

Courts will specifically enforce covenants not to compete to the extent that they are reasonable in light of the circumstances in which they were made. MCL 445.774a(1); MSA 28.70(4a)(1); *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). Defendant does not argue that the covenant not to compete was unreasonable. Thus, in seeking to enforce the covenant not to compete, plaintiff performed a legal act.

The question then became whether this legal act was done with malice and without justification. *BPS Clinical Laboratories*, *supra* at 699. In his amended counter-complaint, defendant alleged that plaintiff had no legitimate business reason for seeking to enforce the covenant and did so only to make an example of defendant. However, the evidence at trial did not support defendant's allegations. Keith Korte, plaintiff's vice-president and secretary, testified that within months of PTS hiring defendant, plaintiff had sold software to PTS and had responded to PTS' request for resúmes in an attempt to place a programmer at PTS. PTS' information technology director confirmed Korte's testimony regarding contact with PTS. Korte further testified that he thought PTS was a client, in accordance with the terms of the covenant not to compete. Defendant admitted that plaintiff's business depended on it being able to retain its employees and not lose employees to its clients. There was no evidence that plaintiff sought to enforce the covenant out of malice or without justification.

When the trial court later determined that PTS was not a client because plaintiff's contacts with PTS were minimal, that determination did not change plaintiff's subjective belief that PTS was a client and that it was properly seeking to enforce the covenant not to compete. Similarly, the determination did not cause plaintiff's actions to be deemed unjustified. Defendant did not establish that plaintiff acted with malice or without justification and plaintiff supported its defense that it acted with a legitimate business purpose. Therefore, the trial court erred in failing to grant plaintiff's motion for a directed verdict, motion for JNOV, and motion for reconsideration.

As a consequence of the resolution of the above issue, it is unnecessary for this Court to review plaintiff's other issues on appeal.

Reversed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot